



<b>Committee</b>	Parliamentary Joint Committee on Corporations and Financial Services
<b>Inquiry</b>	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation
<b>Question No.</b>	032
<b>Topic</b>	ASX CHESS Replacement – ASIC Regulatory Powers
<b>Reference</b>	Spoken 27 June 2022, Hansard pages 43 - 45
<b>Committee member</b>	Mr HAWKE

## Question

### Hansard page 43

**CHAIR:** Let's go back to the fact that we've got the exposure draft. There's some recommendations about powers for ASIC if this arises. I want to go to that. I think I have a sense. It is good to get it all in one place. I think I know, but it's nice to actually get the lesson on exactly what is going on and be really clear about it and how it is interacting with further changes. Given the criticality of CHESS—that's why we're here—and the importance of this being timely, maintained and working properly, and given the concern we've had in the sector about resistance to competition and anti-competitive complaints that have been long articulated, what ASIC powers would necessarily come to pass that are outlined in that exposure draft?

**Mr Bourne:** I mentioned before the policy document that is the regulatory expectations. If we formulated those into rules, we would then have enforceability around them. Some of those particular items are that ASX needs to take into account the feedback it is receiving from its stakeholders. I am positioning it that these are potential things. We would formally respond to issues that are raised in relation to access to the system. What else have we got here?

**CHAIR:** Currently, you don't have the powers to direct that. But this legislation would give you those powers?

**Mr Bourne:** It gives us more ability to put specific rules in relation to this on ASX. At the moment, we have a suite of tools that can be difficult to deploy under all circumstances. For example, we can impose licence conditions with entities that we regulate. But if we want to do that without the other party's agreement or acceptance of them, we need to go through a process to reach a threshold to prove that they haven't met the conditions on their licence. That can be quite a high threshold. We also have the ability to step in and provide directions. One of them has a 21-day limit to it. Some of the changes that are coming through—not necessarily the competition and clearing, certainly, but the FMI reforms, which we see is a dovetailing piece of legislation—will give us more flexibility and capability in the legislation so we can make sure that things are traveling the way we want them to.

**CHAIR:** I will go to the resourcing of that. Is there a particular allocation of FTE?

**Mr Bourne:** From an ASIC perspective?

**CHAIR:** Yes.

**Mr Bourne:** We have been resourcing the development of the CiCS package and the FMI reforms package. When they are passed, I think due to the emphasis industry has placed upon ASIC being able to put in steps to start to bring in rules, we will need to make sure that we have FTE applied to that within the appropriate time frame. At this stage, we have the FTE deployed in a range of areas, including monitoring the CHESS replacement. But if that package passes parliament, we will be looking at where we can deploy our resources best to start to bring them into place. Any rules we bring into place will require extensive consultation with industry. We'll need to update regulatory guides. We'll need to have an enforcement mechanism around that. We already have some of these things in place in other areas, so we can leverage that. But there is quite a lot of work we need to go through to bring those items in place. The chair just reminded me that the minister would need to make a determination once legislation is passed about the financial products that the potential rules could apply to. So it would need to be a



determination that ASIC can write rules in relation to cash equities clearing in settlement, for example, or other products, if it were deemed that was now going to be a contestable space.

**CHAIR:** To increase competition with the benefit of improving productivity and lowering costs, I am assuming?

**Mr Bourne:** Correct.

**CHAIR:** Would ASIC follow its advertised approach to enforcement, which I understand indicates that you exercise discretion on which matters to pursue for those powers, or would enforcement in the areas we have just been discussing have a higher priority?

**Mr Longo:** The enforceability that I think Nathan was referring to. We're talking about a very complex organism here. These are highly regulated markets. If the market entity or operator itself doesn't get on with it, it gives us the flexibility, to use Nathan's word, to intervene quite decisively and quickly. That is enforcement. That is opposed to saying, 'Well, these are our expectations.' Now with these powers, we can say, 'Well, it's more than expectations. We think you ought to be doing this. You're not doing it.' Obviously we will follow a process with the minister. We can take action. I think that complements our general approach to enforcement. The issue in this space has been that our expectations aren't enforceable. That is a problem. If we think the market operator or entity should be doing something and we can't compel them to do it, that's not good, is it?

**CHAIR:** No.

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**Mr HAWKE:** Is this an instrument under the new legislation? Is it a regulation making power of the minister?

**Mr Bourne:** The minister could make a determination. ASIC has writing powers in relation to the competition in clearing and settlement in cash equities, for example. If the minister made that determination, we could then consult on a rules package. I can give you a parallel. We have market integrity rules now because we have competition in trading. We can hold market participants and market operators to account on breaches of those rules. That could be the same under a clearing rule package. So we don't have to necessarily use things such as licence conditions and written directions. We could find them in breach of a specific rule.

**CHAIR:** And do what?

**Mr Longo:** Depending on the activity, the rule making might be a more settled, effective way of dealing with the conduct or objective we're trying to achieve.

**CHAIR:** Can I get a clarification? What does it mean? What are you going to do? What is the action verb of 'doing'?

**Mr HAWKE:** I have a more specific question about what you said. Are you saying that you make the rule and the minister endorses the rule, or you recommend to the minister the rule? That's what I'm asking.

**Mr Bourne:** Currently what would occur is that the minister would need to make a determination.

**Mr HAWKE:** How would the minister do that? Would they make it CFR's problem?

**Mr Bourne:** CFR would probably propose to the minister that a determination is made to give ASIC rule writing powers in relation to a subset of financial products in these circumstances.

**Mr HAWKE:** In this case, you would provide the advice to the minister to make the determination. Is that correct?

**Mr Bourne:** That is the way we've done it in the past in relation to other things.

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**Mr HAWKE:** That would be good.

**Mr Bourne:** When we do make amendments to the market integrity rules, which we do go out and consult on, we do have a mechanism that we reflect back in.



**Mr HAWKE:** A delegated authority?

**Mr Longo:** Even the imposition of licence conditions we do on delegation.

**Mr Bourne:** We do that on delegation. But the minister has the power to call things up.

**Mr Longo:** With the regulatory framework around the markets, for whatever historical reason, there's a strong and elaborate oversight—

**Mr HAWKE:** I understand that.

**Mr Longo:** by the minister and Treasury.

**Mr HAWKE:** I understand all that. You are saying that the scope of the act will change so that the minister will now be able to make determinations with an expanded set of criteria that he was previously able to under the act?

**Mr Longo:** That's right.

**Mr HAWKE:** So there's no change to your powers?

**Mr Longo:** No. There is a change to our powers.

**Mr HAWKE:** It is a change to your powers?

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**Mr Longo:** Yes. At the moment, we don't have that capability. So under these rules—

**Mr HAWKE:** As to the rules, without the minister?

**Mr Longo:** The minister himself or herself can't do it at the moment because there isn't any mechanism.

**Mr HAWKE:** So it is a scope change?

**Mr Bourne:** My team have advised me that we do have very robust processes around the market integrity rules that we currently have. We think that we would have the same approach. If we were to have the minister make a determination that we could write rules for clearing, as we write those rules, the minister would need to be part of that consent to say, 'I make a determination for ASIC to make rules. Consult. Come to the rule package and then bring it back to the minister to approve those rules.'

**Mr HAWKE:** So this is a ministerial power under the act?

**Mr Longo:** To be clear, just at the moment, the extra power we're talking about that the minister is a key part of isn't provided for by legislation, is it?

**Mr Bourne:** No.

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**CHAIR:** Thank you. Mine is much more mundane.

**Mr Bourne:** Chair, could I take the opportunity to clarify a couple of things I said earlier?

**CHAIR:** Yes. I want to ask this question, so hold your thought for a second.

**Mr Bourne:** Okay.

**CHAIR:** What does it mean when you write the rule? You get the rule after all of this. What does it do?

**Mr Longo:** Well, the entity is required to comply with that rule. If it doesn't, we can take action.

**CHAIR:** What does that mean?

**Mr Bourne:** We can use an ASIC delegate, for example. If there's a breach of a rule of this nature, we could have a delegate make a decision on the enforcement action that we wish to take, which could be a pecuniary fine, for example. I think about the way our current market integrity rules operate. We could fine them. If the fine is not paid, we need to go to court, for example, to enforce it.

**CHAIR:** Okay. You said that this is operating—

**Mr Yanco:** Yes. In the market integrity rules—

**CHAIR:** What is the fine?

**Mr Yanco:** It's penalty units.

**Mr Bourne:** They have been reviewed. I think they change depending on what the market integrity rules are. The delegate would need to make a decision on the nature of the breach to determine what the penalty is. It's normally a haircut on the total amount, in any event. But you need to determine the nature



of the breaches and how often the breaches have occurred and such before you make a determination on what the actual proposed fine is going to be.

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**CHAIR:** And that is the only action that can be taken—a fine—at that point?

**Mr Savundra:** Court action.

**Mr Bourne:** Court action is another one.

**Mr Yanco:** Basically, we can require them to undertake—

**CHAIR:** An enforceable undertaking?

**Mr Yanco:** An enforceable undertaking. In the market integrity rules, it's either fine or enforceable undertaking, effectively.

**CHAIR:** And how has having those powers changed behaviour?

**Mr Yanco:** I think we've seen a range of things happen in the market. Mostly, it is with market participants. There was a period when we were having some technical issues with firms. We took a few matters to the committee about that. It seemed to have resolved that situation. Recently, we have seen a few matters where people haven't complied with the buyback rules in terms of putting clients together to create a transaction without going to the market. We are seeing a lot of talk about ASIC taking those matters forward and getting changes of behaviour. I think only one fine hasn't been paid. We went to court. Eventually, it was resolved. So it seems to be a fairly effective—

**CHAIR:** People are figuring out that there are police on the block and that you get punished if you don't do the right thing?

**Mr Yanco:** That's right.

**CHAIR:** That same kind of model is going to be applied in the situation with regard to—

**Mr Yanco:** We don't have to go straight to the disciplinary panel. Recently, we thought one matter was of significant gravity that we went straight to court.

**CHAIR:** Thank you.

**Answer**

**Competition in Clearing and Settlement (CiCS) reforms**

*Background*

In June 2015 the Council of Financial Regulators (CFR), with the ACCC, provided its advice to Government following a review of competition in the clearing and settlement of Australian cash equities. In March 2016 the then Treasurer released CFR's advice,<sup>1</sup> which recommended that:

- the Government adopt a stance of openness to competition in clearing of equities and implement legislative changes for safe and effective competition
- the CFR set out regulatory expectations for ASX conduct while it remains a sole provider, and make legislative changes to allow regulators to enforce the expectations where necessary
- the ACCC be given power to arbitrate disputes about access to ASX clearing and settlement services.

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<sup>1</sup> Department of Treasury, 'Turnbull Government to open competition in share clearance' 30 March 2016  
<<https://ministers.treasury.gov.au/ministers/scott-morrison-2015/media-releases/turnbull-government-open-competition-share-clearance>>



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The then Treasurer released and accepted CFR's recommendations and endorsed a policy stance of openness to competition in clearing for cash equities. On 14 December 2022, the current Treasurer also accepted the recommendations.<sup>2</sup> This included implementing legislative changes to:

- allow the regulators to impose requirements on ASX's cash equity CS facilities, including rule-making powers for ASIC in respect of CS facilities; and
- grant the ACCC an arbitration power to provide for recourse in disputes about the terms of access to ASX's cash equity CS services.

#### *The Treasury Laws Amendment (2023 Measures No. 3) Bill 2023*

On 14 June 2023 the Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 was introduced to the Parliament. The Explanatory Memorandum to the Bill explains that Schedule 3 of the Bill includes amendments to the *Corporations Act 2001* (Cth), the *Competition and Consumer Act 2010* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) to facilitate competitive outcomes in the provision of CS services for Australia's financial markets. The amendments provide ASIC with powers to:

- implement and enforce requirements for a monopoly provider of CS services to operate in a way that achieves competitive outcomes; and
- ensure safe and effective competition in clearing and/or settlement, should a competitor emerge.

The proposed new section 828 of the Corporations Act defines 'CS service' as a service that can only be provided if it has access to a clearing and settlement facility, or to data used in the operation of a clearing and settlement facility. The operation of clearing and settlement is taken to be the provision of a CS service.

The Bill also provides the ACCC with the power to conduct binding arbitration to resolve disputes regarding access to CS services where the CS service and the CS facility it is connected to are part of the same corporate group and are covered by a declaration made by the Minister.

The overarching objective of these amendments is to facilitate outcomes for the monopoly provision of CS services which are similar to those which might be expected in a competitive environment, and to ensure that competition, if it emerges, is safe and effective. Regulators are to ensure that the regulatory framework is not a barrier to the emergence of competition. Whether competition does emerge is ultimately up to the market.

#### *ASIC's proposed new powers*

If the Bill is passed, ASIC and the ACCC will have new powers that would allow the regulators to enforce the following CFR policy statements governing the monopoly provision of CS services and competition in clearing and settlement:

- Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia (the Regulatory Expectations)<sup>3</sup>, September 2017
- Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia (Minimum Conditions Clearing)<sup>4</sup>, September 2017

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<sup>2</sup> [Modernising Australia's financial system | Treasury Ministers](#)

<sup>3</sup> <https://www.cfr.gov.au/publications/policy-statements-and-other-reports/2016/regulatory-expectations-policy-statement/pdf/policy-statement.pdf>

<sup>4</sup> <https://www.cfr.gov.au/publications/policy-statements-and-other-reports/2016/minimum-conditions-safe-effective-cash-equity/pdf/policy-statement.pdf>



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- Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia (Minimum Conditions Settlement)<sup>5</sup>, September 2017

The Explanatory Memorandum explains that ASIC will have a new rule-making power to make rules to facilitate outcomes that are consistent with those expected in a competitive market for CS services, and ensure that competition, should it emerge, is safe and effective. ASIC may make rules that deal with the activities, conduct or governance of CS facility licensees, their associated entities and other persons specified by regulations, in relation to the provision of CS services. The CS services rules are intended to give effect to the CFR policy documents listed above but are not constrained by them. It is intended that the rules may deal with matters including, but not limited to:

- the dealings of a CS facility licensee with users of the facility, including participants, end users, potential or actual competing CS facilities (such as central counterparties and/or securities settlement facilities, and/or central securities depositories), technology service providers and other relevant stakeholders
- the CS facility licensee's governance arrangements (including its board composition and participation of users in the CS facility's governance arrangements)
- the CS facility licensee's arrangements for handling conflicts of interest (including how the CS facility handles confidential information of its competitors)
- the CS facility licensee's accountability (including public reporting)
- the CS facility licensee's provision of services to users (including competitors) including investment in core infrastructure, service levels, transparent, non-discriminatory, and fair and reasonable pricing of the CS services, and the provision of access to the CS services (including data) on transparent, non-discriminatory, and fair and reasonable terms
- coordination, cooperation, and links between CS facilities, including in respect of interoperability, settlement, default management, risk management, recovery, and resolution
- coordination and cooperation between CS facilities, registries, and issuers in respect of the transfer and administration of holdings of financial products; and
- the cessation of the provision of services by a CS facility (including a structured wind-down supported by financial commitments).

Paragraph 3.55 of the Explanatory Memorandum notes that the CS services rules may enforce both the Regulatory Expectations and the Minimum Conditions, which cover monopoly and competitive provision of CS services, respectively. The intention is to provide ASIC flexibility to enforce the Regulatory Expectations over those services that remain a monopoly, whilst simultaneously being able to enforce the Minimum Conditions over particular CS services which may become subject to competition.

A compliance and enforcement regime will also be established with respect to the CS services rules to be made by ASIC. This will include civil penalties and alternatives to civil penalties, and a directions power for ASIC to direct to a person not complying with their obligations under the CS services rules. For example, ASIC may direct the person to do specified things that ASIC believes will promote compliance by the person with those obligations.

#### *Ministerial determinations*

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<sup>5</sup> <https://www.cfr.gov.au/publications/policy-statements-and-other-reports/2017/minimum-conditions-safe-effective-competition/pdf/policy-statement.pdf>



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ASIC will only be able to make rules in relation to CS services that are covered by a Ministerial determination. In making a determination, the Minister must consider certain matters in relation to the effect of a determination, including the likely:

- effect on the Australian economy, and on the efficiency, integrity, and stability of the Australian financial system
- regulatory impact of making the determination, and
- effect on the safety, fairness, and effectiveness of competition in the provision of CS services.

The Minister must consider any matters raised in the advice provided by ASIC, ACCC or RBA in relation to the determination. The Minister may also have regard to any other matters that they consider relevant (for example any relevant international standards or international commitments). ASIC, ACCC and RBA may provide advice on whether a specific determination should be made either on their own initiative or in response to a request from the Minister.

Since determinations are legislative instruments, they will be subject to review by Parliament and, potentially, disallowance. They will also be subject to the consultation requirements set out in section 17 of the *Legislation Act 2003* (Cth).

The rule-making power will initially apply only to cash equities, however the proposed legislative framework is sufficiently flexible for the Minister to make determinations in respect of other financial products if the need arises in the future. Any extension should be based on CFR advice. However, the Explanatory Memorandum notes that the Government's intent is that a determination would, in the first instance, only relate to CS services in connection with cash equities traded in Australia.

#### *The rule-making process*

The process for making the CS services rules will be similar to the way in which the derivative transaction rules, derivative trade repository rules and market integrity rules are made.

Paragraph 3.53 of the Explanatory Memorandum explains that, in deciding whether to make a rule, ASIC must have regard to the same matters the Minister must have regard to in deciding whether to make the determination. The proposed new section 828H lists these matters, which include the likely effect of the proposed rule on the economy and the financial system, the likely regulatory impact of the proposed rule, and the likely effect of the proposed rule on the safety, fairness, and effectiveness of competition in the provision of CS services. ASIC must also have regard to the current market structure for provision of the CS services and any other matters ASIC considers relevant, for example, relevant international standards and matters raised during the rule consultation process. ASIC is expected to rely upon RBA advice in making any assessment on the likely impacts of the proposed rules on the stability of the Australian financial system. The proposed new section 828K stipulates that ASIC cannot make a rule without Ministerial consent. This is consistent with ASIC's current rule making powers in respect of markets, including ASIC's Market Integrity Rules and ASIC's Derivative Transaction Rules.

ASIC will be required to consult with the public, ACCC and RBA before making a rule, unless it is an emergency rule made under the proposed section 828L. Emergency rules may be necessary where there is limited time to respond to changes in the market that threaten safe, fair, or effective competition in the provision of CS services.

#### *Reviewability of decisions*

It is proposed that merits review is not available for a decision by ASIC to make CS services rules under the new section 828A and provide directions under the new section 828G to a person not complying with their obligations under the rules. Paragraph 3.78 of the Explanatory Memorandum explains that this is because matters that would be regulated by CS services rules touch on significant aspects of financial markets. Market certainty is crucial to the efficient functioning of financial markets. A process of merits review with respect to the making of CS services rules and directions to ensure their compliance may



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create uncertainty around expectations with respect to provision of CS services. This would have a negative impact upon the efficient functioning of financial markets.

A decision to exempt a person from provisions under Part 7.3A will be subject to merits review.